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SIX4THREE, LLC

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN MATEO**

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

vs.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual; JAVIER  
OLIVAN, an individual; SAMUEL LESSIN, an  
individual; MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and DOES 1  
through 50, inclusive,

Defendants.

Case No: CIV 533328

**REPLY IN SUPPORT OF  
PEREMPTORY CHALLENGE**  
(Code Civ. Proc. § 170.6)

**COMES NOW** counsel for Six4Three, LLC, Plaintiff herein, replying to the Objection  
to Six4Three's Limited Scope Counsel's Civil Procedure Code Section 170.6 Challenge filed on  
July 5, 2019 (the "Objection"), regarding the peremptory challenge to judicial officer exercised  
by counsel for Plaintiff Six4Three, and respectfully represents as follows:

**I. INTRODUCTION**

The peremptory challenge by Plaintiff's counsel is timely, is in proper form and is  
entitled to prompt acceptance. Facebook, Inc. and other named Defendants offer misstatements  
of law but no actual authority to the contrary.

///

1 **II. ARGUMENT**

2 **A. A TIMELY PEREMPTORY CHALLENGE IS ENTITLED TO PROMPT**  
3 **ACCEPTANCE WITHOUT PRIOR NOTICE OR HEARING**

4 Where a peremptory challenge is timely filed, the court is bound to accept it without  
5 further inquiry. (*Davcon, Inc. v. Roberts & Morgan* (4 Dist. 2003) 110 Cal.App.4th 1355, 1360  
6 (timely motion disqualifies judge “instantly and irrevocably”); *Solberg v. Superior Court* (1977)  
7 19 Cal.3d 182, 187 (“[I]f the motion is timely and in proper form, the judge must recuse himself  
8 without further proof and the case must be reassigned to another judge.”); *Spector v. Superior*  
9 *Court of San Mateo Cty.* (1961) 55 Cal.2d 839, 843 (where challenge made orally at start of  
10 hearing when judge’s identity was first known, “it is clear that Judge Cotton was disqualified  
11 from taking further action in that proceeding and should have disqualified himself.”).) By its  
12 own terms, a peremptory challenge is effective “without prior notice....” (Code Civ. Proc. §  
13 170.6(a)(2).) Subsequent actions of a judge following a proper peremptory challenge are void.  
14 (*McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 565.)

15 To summarize, a peremptory challenge is effective immediately without notice or  
16 hearing. The Defendants filed the Objection without the Court requesting or permitting  
17 briefing. The Objection raises no factual issues, offers no evidence and does not request a  
18 hearing. This reply brief is filed to emphasize that the Court should act upon the peremptory  
19 challenge without delay.  
20

21 **B. THE PEREMPTORY CHALLENGE IS TIMELY AS IT IS MADE**  
22 **PROMPTLY AFTER THE FIRST APPEARANCE OF PLAINTIFF’S**  
23 **COUNSEL**

24 The within peremptory challenge is timely as it is made promptly upon the first  
25 appearance of the undersigned as Plaintiff’s counsel. A peremptory challenge may be made by  
26 a party or a party’s attorney. “The object of this section is to provide the party *and attorney*  
27 with a substitution of judge to safeguard the right to a fair trial and hearing.” (*Fry v. Superior*  
28 *Court* (2013) 222 Cal.App.4th 475, 481 (emphasis added).) “[S]ection 170.6 is to be liberally  
construed in favor of allowing a peremptory challenge, and a challenge should be denied only if

1 the statute absolutely forbids it.” (*Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 62).  
2 “Courts must refrain from any tactic or maneuver that has the practical effect of diminishing  
3 this important right.” (*Hemingway v. Superior Court* (2004) 122 Cal.App.4th 1148, 1158.)  
4 “[C]onsiderations of efficiency do not trump a party's right to file a peremptory challenge of the  
5 judge who will try the case.” (*Zilog, Inc. v. Superior Court* (2001) 86 Cal. App. 4th 1309,  
6 1322.) Code of Civil Procedure § 170.6(a)(2) expressly provides that counsel may make a  
7 peremptory challenge.

8         Plaintiff’s counsel has recently appeared. Contrary to the Defendants’ mistaken  
9 argument that the appearance of Plaintiff’s counsel is somehow not genuine, there is no  
10 authority abrogating Code of Civil Procedure § 170.6 in the case of counsel appearing pursuant  
11 to the procedures provided in Rules 3.35 through 3.37 of the California Rules of Court. Rule  
12 3.36(c) contemplates that an attorney so appearing will be appearing as counsel of record such  
13 that leave to withdraw would be required absent voluntary substitution. The text of Code of  
14 Civil Procedure § 170.6 applies to an attorney “appearing” in the action, without limitation.  
15 The Court should decline the Defendants’ invitation to create and insert a new rule into the  
16 statute.  
17

18         In any event, Plaintiff’s counsel has undertaken a serious and substantive engagement.  
19 The Objection accuses Plaintiff Six4Three and its previous legal team of intentionally  
20 orchestrating a multi-step scheme to violate a protective order and damage Facebook  
21 (Objection, 2:2-13), which will prove to have no basis in fact notwithstanding the duty imposed  
22 upon Facebook and its counsel to investigate before advocating such statements. (Code Civ.  
23 Proc. § 128.7.) Plaintiff is a business entity that cannot appear except through counsel. By  
24 driving a wedge between Plaintiff and its previous legal team, Facebook created the need for  
25 Plaintiff to obtain new counsel. Facebook’s emphasis on the discovery dispute underscores the  
26 fact that it is a serious issue. By agreeing to represent Plaintiff in connection with the discovery  
27 issue, the upcoming case management conference and in any other matter that counsel may yet  
28 agree to handle, counsel for Plaintiff has undertaken a serious and substantive engagement.

1           **C.       THE GENERAL RULE APPLIES SUCH THAT A PEREMPTORY**  
2           **CHALLENGE FILED BY AN ATTORNEY BEFORE TRIAL IS TIMELY**

3           As a general rule, “disqualification of the judge is permitted any time prior to the  
4 commencement of trial.” (*People v. Sup. Ct. (Lavi)* (1993) 4 Cal.4th 1164, 1171.) The general  
5 rule applies to parties as well as their counsel, each of which holds an independent right to  
6 exercise a peremptory challenge, provided that each party or attorney may exercise a  
7 peremptory challenge only once and one side of multi-party litigation may exercise the  
8 challenge only once. (Code Civ. Proc. § 170.6(a)(4).)

9           The general rule applies and is satisfied. The general rule is subject to three potential  
10 exceptions: The “master-calendar” rule, the “all-purpose-assignment” rule and the “10-day/5-  
11 day rule.” The two potentially-applicable exceptions, namely the all-purpose-assignment rule  
12 and the 10-day/5-day rule, are based upon the time of a party’s first appearance, not an  
13 attorney’s first appearance. By their terms, each such exception governs a motion made “by a  
14 party” and not by an attorney. Regardless of how it is styled, the within peremptory challenge  
15 is brought by Plaintiff’s counsel.

16           As Facebook expressly concedes, the all-purpose-assignment rule applies only to parties,  
17 not their counsel. “[A] a party must move within 15 days of assignment. Full stop. This reading  
18 is also the only reasonable or logical reading of the code.” (Objection, 5:20-22). So be it, but  
19 the consequence is that, in the absence of a similar rule for attorneys, the general rule applies.  
20 There is no basis for reading into the statute’s limitation on a party’s right to exercise a  
21 challenge a novel limitation on an attorney’s independent right.

22           Further support is found in adjacent language within the statute itself. A fourth  
23 exception to the general rule, which was for courts where only one judge is authorized (the  
24 “one-judge-court” rule), no longer applies because all courts in California are authorized for  
25 more than one judge. But the statutory language has not been repealed, and it is instructive. By  
26 contrast to the other exceptions to the general rule, the words of the one-judge-court exception  
27 specify that the deadline to make a peremptory challenge runs from when the party appears  
28

1 whose attorney is making the motion, not when the attorney appears. “If the court in which the  
2 action is pending is authorized to have no more than one judge, and the motion claims that the  
3 duly elected or appointed judge of that court is prejudiced, the motion shall be made before the  
4 expiration of 30 days from the date of the first appearance in the action *of the party who is*  
5 *making the motion or whose attorney is making the motion.*” (Emphasis added; *see People v.*  
6 *Superior Court (Smith)* (1987) 190 Cal.App.3d 427, 429-430 (holding that plain language of  
7 one-judge-court rule is such that deadline runs from when party appears whose attorney is  
8 making the motion, not from that attorney’s appearance), *abrogated on other grounds by Jones*,  
9 246 Cal.App.4th 390.) By contrast, the all-purpose-assignment exceptions governs only  
10 peremptory challenges made “by a party....” The legislature could have used similar language  
11 for the all-purpose-assignment exception, but it did not. Accordingly, the all-purpose-  
12 assignment exception does not abrogate the general rule as applied to attorneys.

13  
14 The Defendants misstate the law when they quote *Smith* out of context. Specifically, the  
15 Defendants argue that California appellate courts recognize no right to peremptory challenge for  
16 late-appearing counsel, citing to *Smith* without discussion (Objection, 6:15-19). However, the  
17 court in *Smith* was concerned with the one-judge-court exception, as discussed above, which no  
18 longer applies in any court. In context, the *Smith* court’s comments about late-appearing  
19 counsel pertain to the “special rule” of the one-judge-court exception. (*Smith*, 190 Cal.App.3d  
20 at 430).

21 The within peremptory challenge is timely pursuant to the general rule. Neither trial nor  
22 a hearing to determine contested fact issues relating to the merits of the matter has commenced.

23  
24 **D. IF THE ALL-PURPOSE-ASSIGNMENT EXCEPTIONS APPLIES, THE  
PEREMPTORY CHALLENGE IS TIMELY NEVERTHELESS**

25 In the alternative, if the all-purpose-assignment rule or the 10-day/5-day rule applies,  
26 then each is satisfied. The all-purpose-assignment rule provides that: “If directed to the trial of  
27 a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the  
28 assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose

1 assignment....” (Code Civ. Proc. § 170.6(a)(2).) The rule is satisfied by counsel making a  
2 peremptory challenge within 15 days of notice of the all purpose assignment. Plaintiff’s  
3 counsel first appeared recently and filed the peremptory challenge well within 15 days of  
4 learning of the all purpose assignment. (*Jones v. Superior Court* (2016) 246 Cal.App.4th 390,  
5 403 (For all-purpose-assignment deadline to run, notice of assignment must be actual and not  
6 constructive.))<sup>1</sup>

7         The language of the statute is unambiguous: The one to whom notice must be given is  
8 the one who holds the right to exercise the challenge. Notice to counsel of the all purpose  
9 assignment is required before counsel’s right to exercise a peremptory challenge can be cut off.  
10 A contrary reading of the statute would mean that eventual counsel for an unrepresented party  
11 loses its right to peremptory challenge if not retained within approximately two weeks of the  
12 party’s first appearance. This interpretation is contrary to the language and intent of the statute,  
13 which provides a right to peremptory challenge to both a party as well as counsel.

14         Here, the all-purpose-assignment rule is satisfied. The within matter has been assigned  
15 to the Honorable V. Raymond Swope for all purposes. The within peremptory challenge is filed  
16 promptly after counsel’s first appearance in this matter and well within 15 days of counsel first  
17 learning of the all-purpose assignment.  
18

19         **E. IF THE 10-DAY/5-DAY EXCEPTION APPLIES, THEN IT IS SATISFIED**  
20         **AND THE PEREMPTORY CHALLENGE IS TIMELY**

21         If the 10-day/5-day rule applies, then it is satisfied. No trial or hearing to determine  
22 contested fact issues relating to the merits of the matter will commence for at least five days.

23         **F. NO OTHER EXCEPTION APPLIES**

24         No other exception applies. Trial in this matter is not subject to open assignment on the  
25 Court’s master calendar. (*Lavi*, 4 Cal.4th at 1175-1178 (Despite court being labeled a “master  
26 calendar court,” master-calendar rule not applicable when master calendar department assigns  
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28 <sup>1</sup> In this case, although orders assigning the matter for all purposes have been entered, a notice of assignment has not been filed or served. Arguably, under *Jones*, notice has not been given and the general rule of timeliness continues to apply.

1 ‘long cause’ matter for trial well in advance.)) The judge has not determined any contested fact  
2 issues related to the merits of the action. (*Zilog*, 86 Cal.App.4th at 1322 (Judge who ruled on  
3 motion for summary adjudication remains subject to peremptory challenge.); *Lam v. Ngo* (2001)  
4 91 Cal.App.4th 832, 843 (In another context, commenting that an anti-SLAPP motions is “akin  
5 to a summary judgment motion....”))

6 Plaintiff has not previously exercised a peremptory challenge under Code of Civil  
7 Procedure § 170.6 in this matter. Confusingly, the Defendants cite authority for the  
8 unremarkable proposition that an attorney’s right to peremptory challenge does not entitle a  
9 party or side to make multiple challenges (Objection, 6:3-14). Indeed, the rule that each side  
10 may make only one challenge mitigates any concern for multiple challenges.

11  
12 **G. THE COURT SHOULD DECLINE DEFENDANTS’ INVITATION TO**  
13 **INVENT NEW EXCEPTIONS THAT DO NOT APPEAR IN THE**  
14 **STATUTE**

15 The Court should decline the Defendants’ invitation to invent new exceptions and add  
16 them to Code of Civil Procedure § 170.6. First, the statute provides no exception for judge  
17 shopping or bad faith.

18 The law assumes that a party who disqualifies a judge by a motion under  
19 section 170.6 does so in good faith. It is common knowledge that some  
20 attorneys or parties may abuse the statutory privilege by disqualifying a judge  
21 for tactical reasons, without any genuine belief that the judge is prejudiced ...  
22 Nevertheless, section 170.6 provides that, without any inquiry as to the  
23 motives of the moving party ... the judge is thereupon disqualified ...  
24 (*Brown v. Sup.Ct. (14011 Ventura Blvd. Corp.)* (1981) 124 Cal.App.3d 1059, 1061-1062,  
25 (emphasis added; internal citations omitted).) A timely peremptory challenge must be granted  
26 even if the court suspects abuse and that the challenge is made for tactical reasons. (*Solberg*, 19  
27 Cal.3d at 196-198; *School Dist. of Okaloosa County v. Sup.Ct. (City of Orange)* (1997) 58  
28 Cal.App.4th 1126, 1136 (bad faith does not invalidate disqualification motion; court’s views  
concerning good faith of party or attorney were irrelevant).) Here, Plaintiff’s counsel is acting

1 in good faith, but even a challenge brought in bad faith is valid. Accordingly, Defendants'  
2 protestations of judge shopping and bad faith are irrelevant.

3 Alleged defects in the form of peremptory challenge are not grounds for denial of the  
4 challenge. *Retes v. Sup.Ct. (Southern Pac. Co.)* (1981) 122 Cal.App.3d 799, 807 (peremptory  
5 challenge is important right that is not defeated by failure to comply with formality; judge has  
6 duty to point out any defects and permit correction).) Here, Plaintiff's counsel filed its  
7 peremptory challenge in form substantially identical to the form prescribed by Code of Civil  
8 Procedure § 170.6(a)(6) itself. In fact, the Defendants do not appear to be confused by the form  
9 of challenge.

### 10 **III. CONCLUSION**

11 In light of the foregoing, Plaintiff's counsel is entitled to prompt acceptance of its  
12 peremptory challenge.

13 DATED: July 8, 2019

14 MACDONALD FERNANDEZ LLP

15 By: 

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17 Attorneys for Plaintiff,  
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8 ///

9 ///

10 As follows:

11 ☒

12 BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy  
13 through the Macdonald Fernandez LLP electronic mail system from to the email  
14 addresses set forth above.

15 Executed on July 8, 2019, at San Francisco, California.

16 I declare under penalty of perjury under the laws of the State of California that the foregoing  
17 is true and correct and that I am employed in the office of a member of the bar of this Court, at  
18 whose direction the service was made and that the foregoing is true and correct.

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Samantha G. Brown